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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BERNARD UEHLEIN, et al.,

Respondents,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY, et al.,

Respondents,

Appeal of:

SHIRLEY A. MUELLER and GREGORY A. JENNINGS,
Executor of the Estate of Robert V. Mueller, Deceased,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether, under the facts and record of this case, a district court's refusal to turn over life insurance proceeds under its control but promptly payable upon death to the sole named beneficiary and widow of the decedent insured, pursuant to the terms of the policies and State law, is an order immediately appealable under 28 U.S.C.A. §§ 1291 or 1292.

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BERNARD UEHLEIN, et al.,

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SHIRLEY A. MUELLER and GREGORY A. JENNINGS, Executor of the Estate of Robert V. Mueller, Deceased,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Shirley A. Mueller, (hereinafter sometimes referred to as "the Widow") and Gregory Jennings, Executor of the Estate of Robert V. Mueller, Deceased, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 25, 1986, dismissing their appeal for lack of jurisdiction.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at 794 F.2d 300 (7th Cir. 1986). It is reproduced in the appendix hereto. (Appendix A, pp. A-1 to A-6). Also reproduced in the appendix is the Minute Order of the District Court which was rendered without opinion. (Appendix C, p. C-1).

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1986. A timely petition for rehearing with suggestion for rehearing *in banc* was denied on August 13, 1986. (Appendix B, p. B-1) The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves an interpretation of the Fifth Amendment to the United States Constitution which provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law. . . .

This case also involves the interpretation of 28 U.S.C. §§ 1291, 1292 and 18 U.S.C. §§ 1961-1968 to determine whether the denial of Petitioners' Motion for Turnover of life insurance proceeds due her as sole beneficiary was appealable.

STATEMENT OF THE CASE

In 1984, a group of creditors of Petitioner's late husband filed a "R.I.C.O." suit against, *inter alia*, her, three insurance companies who insured his life, and the Executor of his Estate. Initially, a preliminary injunction was requested against the insurers to "prevent disbursement" of death benefits due the Petitioner by reason of her husband's death. When the insurers interpled, the Plaintiffs dropped all requests for injunctive relief.

The Plaintiffs (including the decedent's former insurance agent who sold him the policies) filed the "R.I.C.O." suit against decedent's Widow, the Executor and three insurers after it appeared that the assets of the decedent's estate were insufficient to satisfy his debts and that the only funds to which they might look for succor were the Widow's death benefits.

No other relief was sought against the insurers. The insurers have admitted that except for Plaintiffs' bald "R.I.C.O." allegations, the Widow would have promptly received her vested death benefits. Therefore, the deposit of proceeds via interpleader was a reasonably foreseeable or planned result of Plaintiffs' tactics. In any event, as the opinion of the Seventh Circuit states, the Widow is the undisputed sole beneficiary of the subject policies.

In the district and appellate courts, the Widow maintained, *inter alia*, (1) that the Plaintiffs' Complaints failed to state a claim and was really a request for pre-judgment attachment; (2) that on the state of the record, the interference with payment was an unconstitutional deprivation of the use of her property, whereby the court, without justification, was holding her property hostage in anticipa-

tion of the mere expectancy or possibility that Plaintiffs might some day be victorious in their damage action against her and the estate; (3) that the issue of her present entitlement to the use and benefit of the proceeds was a sufficiently separable concern to warrant prompt disposition and review; and (4) that the delay in resolution of that issue and denial of her request that the court release the funds to which she had the paramount and exclusive legal right of possession denied her due process and worked a substantial and continuing hardship on her and her minor daughters.

For almost two years, the Widow's death benefits have remained frozen under the garb of a responsive interpleader triggered and sustained by the mere force of the filing and maintenance of Plaintiffs' unsupported allegations. Yet, during this time, none of the Plaintiffs answered the insurers interpleader counterclaims despite the fact that they were triggered by their complaints.

After much procedural wrangling, in December of 1985, the Widow moved the district court for a prompt hearing and release of the proceeds due her as sole beneficiary under the policies and Illinois law. Her package of motions included requests for prompt hearing, severance and an order directing the Escrowee to turn over the insurance proceeds to her. At this time, her motion to dismiss Plaintiffs' amended complaints (which prayed for no relief in connection with the proceeds) was pending and "under advisement".

When these motions were presented, the district court had pending before it only unverified allegations against the Widow and had not conducted an evidentiary hearing. Yet, when the Widow's counsel argued that her constitutional rights were being infringed, the District Judge stated, "She's had more due process than she deserves".

None of the insurers filed any responses or objections to any of the Widow's motions. Most Plaintiffs did not respond and those who did, did so late and without leave of court. In any event, none of the parties, except the Widow, filed any affidavits in connection with these motions.

Thereafter, for over almost four (4) months, the district court refused to rule on these motions despite the Widow's repeated requests.

As stated in the Seventh Circuit's opinion, Petitioner has suffered and will continue to suffer extreme and progressively adverse consequences by reason of the order of the district court in the form of continued deprivation of a substantial vested property right and the corresponding lack of resources to finance her defense.

If the litigation in the district court proceeds for additional years at its current snail's pace, involving over 100 depositions and a protracted trial, her right to effectively challenge the district court's ruling, which presently works a deprivation of the use of a fund now approaching 5 million dollars with accrued interest, is rendered meaningless by the mere possibility of eventual appeal and such future possibility serves as no adequate substitute for immediate appeal since in addition to the ongoing deprivation of a present possessory interest, that right would ultimately be rendered moot.

When the district court summarily denied, without written opinion, the Widow's request for turn over, her apparent hardship prompted the court to invite her to petition the court for a disbursement of the "excess" funds on deposit, thereby recognizing her paramount and present possessory right to the subject property but disclosing the district judge's avowed intent to continue to hold captive a sum of money sufficient to cover the huge sums sought

by the Plaintiffs pending the ultimate disposition of their demands even though they no longer had pending any claim to the specific proceeds.

In view of the district court's statements that no prompt hearing would be conducted, that a motion to certify would be futile, and that he would not turn over all her property, the Widow filed a notice of appeal seeking review of the district court's ruling by the Seventh Circuit. She respectfully submits that the impact of these events are tantamount to an injunction, arbitrary detention or attachment freezing and holding hostage her husband's death benefits as a "pool of assets" in anticipation of a possible levy until the district judge is satisfied as to the ultimate disposition of the Plaintiffs' irrelevant damage claims.

Alternatively, the Widow submits that the district court's Order had the practical effect of denying not only her right to a prompt hearing but also her request for a mandatory permanent injunction ordering the Escrowee to turn over all of her property to her.[1] In either event, she submits that the district court's Order refusing to release her property was immediately appealable and that the Seventh Circuit erred in refusing to find that it possessed jurisdiction to permit review under the circumstances of this case.

---

[1] In actuality, since the funds were being held by the appointed escrowee as agent of the court with whom they were deposited pursuant to its own order, the Widow's request was really designed to have the court release the Petitioner's property then under judicial control. Therefore, the Seventh Circuit's statement at page 6 of its opinion ". . . the denial of one litigant's request to compel another litigant to surrender the stakes of the case . . ." was a misapprehension of the record since the insurers had surrendered any interest in the proceeds by depositing same with the court and the Plaintiffs had not demonstrated or established any legal or equitable interest therein which could be surrendered.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S DENIAL OF IMMEDIATE REVIEW VIOLATES AND IGNORES CONSTITUTIONAL DUE PROCESS AND APPELLATE STANDARDS SET BY THIS COURT AND CREATES A CONFLICT AMONG THE CIRCUITS.

Though the Seventh Circuit's opinion dwelled on the dramatic hardship visited on the Widow by the awesome burden of this litigation, the primary thrust of her argument was ignored. While recognizing at page 3 of its decision that to date no court has addressed (in a suit involving interpleader) the question of whether a refusal to turn over proceeds is appealable, the Seventh Circuit reasoned at page 4 that the harm suffered by her was not ". . . different in kind . . . from the hardship many litigants endure during a law suit". However, the Court of Appeals neither mentioned nor adhered to this Court's standard of "serious, perhaps irreparable consequence" recently reiterated by its own opinion in *Brown v. Kerr-McGee Chemical Corporation*, 767 F.2d 1234, 1238-1239 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1378 (1986). See, *Carson v. American Brands, Inc.*, 101 S.Ct. 993 (1981) (appellate jurisdiction exists if order can only be "effectively challenged" by immediate appeal).

This case does not merely involve the "ordinary sacrifices of litigation", but rather, an ongoing prevention of payment and use of vested insurance proceeds which would never have occurred but for the joining of insurance companies against whom no true relief was ever directly sought, (except an initial prayer of preliminary injunctive relief which was abandoned after deposit of the funds).

The triggering of a deposit by a naked prayer for relief later abandoned should not disturb the parties respective rights as they existed before the original filing when, as stated by the insurers in their answers and counterclaims, payment would have been made to the Widow but for the initial injunctive request not pursued. The Widow argued that the deprivation of the present use of her substantial *vested* property visits upon her serious and irreparable consequences. The Seventh Circuit's opinion, in noting no distinction in the "kind" of harm, was wholly indifferent to the constitutional objections and the standard of "effectual challenge" raised by the Petitioner. Incredibly, at page 4 of its opinion the Seventh Circuit stated ". . . if the refusal to turnover funds was in error, this will not hurt Shirley Mueller." Nevertheless, this case presents basic and profound due process issues of jurisdictional proportions which transform this case into one deserving immediate review. In *Hernandez v. Finley*, 471 F.Supp. 516, 521 (N.D. Ill. E.D. 1978), a bedrock tenet was observed:

> . . . the *possibility of eventual* appeal is no substitute for the right of immediate appeal challenging plaintiff's *current deprivation* of property. (Citation omitted.) (Emphasis in italics by the Court.)

The fact that a constitutional issue coincidentally happens to arise in connection with an inappropriately spawned interpleader does not belie its existence nor diminish the need for its prompt resolution. See *Kohn v. American Metal Climax, Inc.*, 485 F.2d 255, 262 (3rd Cir. 1972) (order preventing distribution of $10,000,000.00 escrow fund held immediately appealable).

A serious detention of property analogous to attachment is occurring in this case. By definition, "attachment" lays hold of and appropriates the property of a defendant, keeping it in the custody of the law until the rights of the parties are determined in the principal suit and it

might be needed to satisfy the creditors' demands. See *Ashland Oil, Inc. v. Gleave*, 540 F.Supp. 81 (W.D. N.Y. 1982). See also, *Peter Fischer Import Motors v. Buckley*, 460 N.E.2d 347 (Ill.App. 1st Dist. 1984).

In *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 629, 51 N.E. 569, 572 (1898), *Schultz v. Bank of Lyons*, 66 Ill. App. 3d 694, 384 N.E.2d 113, 115 (1979), *Bank of Lyons v. Schultz*, 78 Ill. 2d 235, 399 N.E.2d 1286, 1289 (1980), and *Ashland Oil, supra*, it was held that judicial action which has the effect of preventing a person from using, enjoying, and dealing with money rightfully due to her constitutes a seizure of that specific property. Moreover, the foregoing Illinois cases hold that the fact that the withheld funds are ordered deposited with the clerk of a court does not detract from characterizing such action as a seizure of property.

The Seventh Circuit has totally rejected without comment the prior pronouncements of the Illinois courts as well as those of this Court on the question of the Widow's entitlement to the present use of property and her right to a prompt hearing. It is clear that a prompt and meaningful hearing at a meaningful time must be had *before* any one is deprived of the use of property. This elementary precept is spelled out in *Fuentes v. Shevin*, 92 S.Ct. 1983 (1972); *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972); *Sniadach v. Family Finance Corp.*, 89 S.Ct. 1820, 1823 (1970), and *Lynch v. Household Finance Corp.*, 92 S.Ct. 1113, 1122 (1972). See also, *Ashland* and *Buckley, supra*, and *Memphis Light, Gas & Water Divisicn v. Craft*, 98 S.Ct. 1554 (1978). Instead of addressing this fundamental and all pervasive issue, the Court of Appeals chose to discuss or become sidetracked on a sub-issue of the Widow's undisputed grave ongoing hardship and its speculation on other aspects of the case rather than on the premise ex-

pressed in *Fuentes* that "From the standpoint of the application of the Due Process Clause, it is immaterial that a deprivation may be temporary and non-final . . .". 92 S.Ct. at 1988.

Recently, this Court stated in *United States v. $8,850*, 461 U.S. 555, 76 L.Ed.2d 143 at 150 n. 12, 103 S.Ct. 2005 (1983):

> . . . The general rule, of course is that absent an "extraordinary situation" a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. Boddie v. Connecticut, 401 US 371, 378-379, 28 L.Ed. 2d 113, 91 S.Ct. 780 (1971). See also North Georgia Finishing, Inc. v. DiChem, Inc., 419 US 601, 42 L.Ed. 2d 751, 95 S.Ct. 719 (1975); Fuentes v. Shevin, 407 US 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972); Sniadach v. Family Finance Corp., 395 US 337, 23 L.Ed. 2d 349, 89 S.Ct. 1920 (1969); cf. Mitchell v. W. T. Grant Co., 416 US 600, 40 L.Ed. 2d 406, 94 S.Ct. 1895 (1974).

Nevertheless, the district judge did not conduct a hearing for almost two years; and when repeatedly requested to do so "promptly", he repeatedly deferred ruling on that request in the absence of any timely response by the opposing parties or the insurers for almost four months and in the end refused to conduct any hearing at all as to whether the seizure was justified, thus perpetuating a "judicial freeze" of the Widow's death benefits.

It is submitted that the district court and the Seventh Circuit failed to honor this Court's teachings in *Fuentes* and thereby set a dangerous precedent. *Fuentes* holds that the mere application of a private person seeking seizure is insufficient *since*, contrary to the misapprehension of district and appellate courts, *arbitrary deprivation of a present property interest cannot be subsequently and fully remedied.*

The Seventh Circuit's ruling in the instant case also conflicts with the Second Circuit's recent decision rendered in *Feit & Drexler, Inc. v. Green,* 760 F.2d 406 (2nd Cir. 1985). In *Feit* an immediate appeal was permitted under Section 1291 from a continuation and refusal to modify a turn over order. There, it was noted that a rigid application of "the final judgment principal" might create undue hardship. In *Feit,* like *Brown* and *Hernandez,* it was noted that in certain cases such as in the matter at bar, Section 1291 is to be given a practical rather than a technical construction especially where there exists a question of substantial deprivation of property rights. The Second Circuit in *Feit* held:

> Nor do we see any basis for viewing as unsatisfied either the requirement that lack of immediate review may have irreparable consequences or the requirement that the order appealed from have a relationship to the merits or to the relief sought in the action. By its terms, the July 17 Order deprives Violet of both the use and the possession of a substantial portion of her property during the pendency of the Trustee's action. Such a deprivation is surely a "serious, perhaps irreparable consequence". *Divested of the ability to use any assets but her current salary and pension, Violet will be unable to conduct the affairs of her life without substantial constraint. Nor could the consequences of this deprivation be remedied effectively by review after a final decision in the underlying action, since opportunities to use and employ the property during the pendency of the action would not be recapturable. Thus, we view the July 17 Order as one having serious and irreparable consequences.*
>
> Finally, it is plain that the July 17 Order was expressly designed to aid in giving the substantive relief sought in the complaint. The Trustee's complaint seeks a money judgment from Violet. The avowed

> purpose of the July 17 Order was "to prevent a potential judgment from becoming ineffectual," *and its effect is to collect and preserve a pool of assets from which such a judgment can be satisfied.* Thus, the July 17 Order is within the category of injunctive orders we described as appealable in *Miller v. United States.* We find little merit in the Trustee's contention that the July 17 Order is not appealable under Section 1292(a) because "[t]he mandatory injunction has not affect [sic] whatever on the upcoming trial on the merits; it merely offers security for any judgment which may ultimately be rendered." The required relationship to the merits is satisfied when the preliminary injunction is designed to ensure the availability of the substantive relief sought in the suit. And if we were to agree with the Trustee that there were no such relationship, we might well be compelled to view the July 17 Order as a collateral order of the type that is appealable under Section 1291 pursuant to the *Cohen* doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949) (order requiring plaintiff to post security for costs of suit held final and appealable under Section 1291). (Emphasis supplied.) *Id.* at pp. 412, 413.

Reviewability was found to exist in *Feit* since, as here, the substantial thrust of the situation was to "ensure the availability of the substantive relief sought in the suit." *Id.* 760 F.2d at 412-413. The authorities relied upon by the Seventh Circuit are distinguishable since they do not involve interference with a vested right, but arose within the context of a distinct class of cases governing discovery and did not address the fundamental constitutional questions raised here. Furthermore, the possibility of the Widow eventually recovering interest upon vindication is simply not a full substitute for the present use of the proceeds. See *Fuentes, supra.* If an immediate appeal is not

permitted now, the Widow's right to review could be rendered moot. See *In Re: Bishop, Baldwin, Rewald, Dillingham & Wong*, 779 F.2d 471, 476 (9th Cir. 1985).

Here, the district and appellate courts' rulings also raise serious due process implications since the Widow was also denied a prompt hearing. The district court's actions, continued detention of Petitioner's property for the private benefit of the Plaintiffs (not at their insistence but at the court's own behest), work an unfair deprivation of her possessory interest to that property in violation of the Fifth Amendment under the guise of judicial procedure. See *Fuentes v. Shevin*, 92 S.Ct. 1983, 1991, 1994-1998, 2000 n. 30 (1972); see also, *United States v. $62,972 in U.S. Currency*, 539 F.Supp. 586 (D.C. Nev. 1982), (delay of approximately 10 months unreasonable and unjustified where defendant deprived of property); *United States v. Eight Thousand Eight Hundred Fifty Dollars*, 101 S.Ct. 2005 (1983), ("being deprived of . . . substantial sums of money for a year and a half is undoubtedly a significant burden."); *In Re: San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981) (the effect any delay may work in its totality should be considered); *United States v. Ray*, 731 F.2d 1361 (1984), (due process required immediate hearing where assets frozen and interlocutory appeal allowed to challenge district court's refusal to modify order freezing assets); *United States v. Thirty-Seven Photographs*, 91 S. Ct. 1400, *reh. den.* 91 S.Ct. 2221 (1971) (administrative delay of 14 days without hearing in connection with seizure of property transgressed due process); *United States v. Crozier*, 674 F.2d 1293 (9th Cir. 1982), *vacated and remanded*, 104 S.Ct. 3575 (1984), *opinion on remand*, 777 F.2d 1376, 1383-84 (1985) (a denial without a hearing of the vacation of an order tying up a person's property worked a lengthy and impermissible deprivation of defendant's property).

As an additional basis for jurisdiction, since, in effect, the district court stayed its own proceedings on the question of the Widow's present entitlement to the subject life insurance proceeds pending the outcome of the remainder of the proceedings, thereby terminating her opportunity to have the substantial benefit of the proceeds *pendente lite* is found under the doctrine pronounced in *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942). The Seventh Circuit failed to address the *Ettelson* doctrine.

Here, the Seventh Circuit refused to fairly confront a fundamental and over-riding due process issue that is present here and which transcends the mere collateral and coincidental interpleader aspect of this case. It is submitted that in actuality the instant case has all the trappings of pre-judgment attachment. This conclusion is apparent if one analogizes the flexible due process concept mandated in *Morrissey* to Justice Stewart's famous test for obscenity—"I know it when I see it"—set forth in his concurrence in *Jacobellius v. Ohio*, 378 U.S. 184, 197 (1964).

This case also comes within the judicially created exception coined the "collateral order doctrine" which was summarized by this Court in *United States v. Home Indemnity Co.*, 549 F.2d 10 at p. 12 (7th Cir. 1977), quoting *Cohen*:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, *too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia v. Sweeney*, 1 Pet. 567, 569, 7 L.Ed. 265; *United States v. River Rouge Co.*, 269

U.S. 411, 415, 46 S.Ct. 144, 145, 70 L.Ed. 339; *Cobbledick v. United States*, 309 U.S. 323, 328, 69 S.Ct. 540, 542, 84 L.Ed. 783. (Emphasis supplied.)

Where the prime question of whether postponement of review is likely to work an "injustice by delay", the danger should be avoided and the appeal should be allowed. See *Dickenson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, 70 S.Ct. 332, 329, 94 L.Ed. 299 (1950); *Gardner v. Westinghouse Broadcasting Company*, 559 F.2d 209 (3rd Cir. 1977). See also, *Joseph Hughs & Co., Inc. v. United Plumbing & Heating, Inc.*, 390 F.2d 629 (6th Cir. 1968).

It is submitted that the Seventh Circuit's ruling was not practical, but hyper-technical, rigid and violative of this Court's pronouncement in *Morrissey* that "due process is flexible and calls for such procedural protections as the particular situation demands". By disregarding the Widow's plea for prompt review of the violation of her due process and property rights, the Court of Appeals not only devastated her practical ability to defend herself but also ignored the decisions of this Court and other federal courts cited by the Widow which realistically recognize that immediate review under such circumstances is the only real, fair, and just course of action available. To relegate the Widow to a belated review of the simple question of *present* entitlement which cannot be meaningfully determined at the conclusion of this litigation is not just and works an effective deprivation of her rights to ever obtain any full and complete remedy for a serious and ongoing wrong. The ruling of the Seventh Circuit has the practical effect of rendering the Widow powerless to avert the mischief visited upon her which can only be alleviated by a prompt appeal and therefore, it contravenes the ultimate spirit and practical test of appellate jurisdiction. See *Theriault v. United States*, 503 F.2d 390 (9th

Cir. 1974); *McMann v. Hertz Equipment Rental Corp.*, 791 F.2d 88 at 90 (7th Cir. 1986); *Plymouth County Nuclear Information Committee v. Boston Edison Co.*, 655 F.2d 15, 17 (1st Cir. 1981); *United States v. Dorfman*, 690 F.2d 1230 (7th Cir. 1982); *Gillis v. U.S. Dept. of Health and Human Services*, 759 F.2d 565 (6th Cir. 1985); *Murrow v. Clifford*, 502 F.2d 1066 (C.A. N.J. 1974).

It is submitted that the Seventh Circuit should have determined on the record that a severable appealable question of present entitlement to the death benefits existed as a matter of law since that question involves a simple determination of present entitlement to property under state insurance law. See *Hebel v. Ebersole*, 543 F.2d 14 (7th Cir. 1976).

It is further submitted that the Seventh Circuit should have been less harsh in its interpretation of the limits of its own power of appellate review given the above factors and overriding due process considerations. Given the exceptional and admittedly unprecedented nature of this case, the fears expressed in its opinion are not likely to come to fruition and do not outweigh the paramount and flexible requirements of the Due Process Clause.

The Seventh Circuit's suggestion that interest accruing on such a substantial fund, especially in view of the absence of claims to it as against a vested beneficiary's right thereto, is not a constitutionally sufficient substitute for divestiture of the Widow's present right to use and employ that property given this Court's pronouncements in *Fuentes*. This is so ". . . since opportunities to use and employ the property during the pendency of the action would not be recapturable. Thus . . . having serious and irreparable consequences". *Feit, supra*, at pp. 412-413. See also, *Fuentes, supra*, at pp. 1994-1998, 2000 n. 30. See also, *Ettelson, supra.*

Since the Seventh Circuit's opinion was the product of flawed reasoning that flowed from the foregoing misapprehensions and a misinterpretation of congressional intent and purpose of §§ 1291 and 1292, it is respectfully submitted that *certiorari* should be granted since the absolute denial of the Widow's opportunity to promptly appeal is manifestly unjust. One of these misapprehensions was the court's characterization at page 6 of its opinion of the denial of the Widow's motion as being ". . . the denial of one litigant's request to compel another litigant to surrender the stakes of the case. . .". This is not true since the proceeds were deposited pursuant to order of the district court with a court appointed non-party escrowee, the Exchange National Bank, instead of its clerk merely to assure a top financial return *pendente lite*. Thus, the escrowee was not "another litigant".

It is further submitted that review by this Court is required since this case raises a basic question of federal appellate jurisdiction. The Seventh Circuit itself noted at page 3 of its opinion, "[s]urprisingly, apparently no reported decision addresses the question whether a refusal to turn over proceeds in an interpleader[2] action is an appealable collateral order".

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[2] The overriding context of this litigation is not that of "interpleader". At the time of the Widow's petition for turnover, plaintiffs sought only money damages and *not* the proceeds of the fund. To borrow the Seventh Circuit's terminology, the underlying suit has a "questionable pedigree" as an interpleader action since there were no conflicting claims to this particular fund. Thus, these plaintiffs have gotten by procedural ploy that which they could not have gotten by injunction. Herein lies the injustice. Had the same substantial result occurred under the form of preliminary injunction, no question would exist but that such order would be appealable. See *Ashland Oil, Inc., supra; USACO Coal Company v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982), and *Roland Machinery Company v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984). Therefore, the Seventh Circuit's paradoxical decision

(Footnote continued on following page)

So, here, the denial of a prompt appeal has denied this Petitioner the due process guaranteed her by the Fifth Amendment to the United States Constitution. The only possible or adequate avenue of relief which remains available to her is to "effectually challenge" the district court's denial of her request for relief by immediate appeal. To vindicate that precious right and prevent a grevious wrong from going unremedied this Court's must grant *certiorari*.

II.

THE SEVENTH CIRCUIT'S DECISION IGNORES THE FACT THAT, WHEN THE WIDOW'S PETITION FOR TURNOVER WAS PRESENTED, NO CLAIMS WERE PENDING BY PLAINTIFFS TO THE SPECIFIC PROCEEDS OF THE SUBJECT POLICIES.

At page 1 of its opinion, the Seventh Circuit states, *inter alia*, ". . . plaintiffs say . . . that they are therefore entitled to the proceeds of the policies". This is incorrect. Though it is true that at the time of the commencement of their suit, certain Plaintiffs requested such relief in their original prayer, they never took steps to enjoin the payment of said proceeds to the Widow. When the monies were deposited by the insurers pursuant to interpleader, these very same Plaintiffs filed amended complaints which requested damages, but *abandoned their request and direct claim to these particular proceeds*. (See, Plaintiffs' First Amended Complaint, N.R. 128, and Second Amended Complaint, N.R. 158.) So, at the time of the bringing of the Widow's request for prompt hearing and turn-over, the action had lost, if it ever possessed, a

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[2] *continued*
is one adhering to form and overlooking substance dominated by an inappropriate preoccupation for generally avoiding review at all costs at an interlocutory stage of litigation.

"pedigree" as an interpleader; and the insurance proceeds were being held not to determine competing claims to them (since none existed) but rather, for the improper purpose of assuring that a "pool of assets" would exist at the conclusion of the case from which possible judgments sought in the pending "R.I.C.O." suit might be satisfied. See *Feit, supra.* Thus, *inter alia,* the Seventh Circuit seriously misapprehended the record and the law by stating at page 3 of its opinion: "An appellate court could not evaluate the district court's decision without deciding who is likely to prevail on the merits" since, again, when the Widow's motion for release of her property was before the district court, the Plaintiffs had not answered the interpleader counterclaims (pending for almost two years); and their prayers for relief as to these specific funds had been dropped by way of their amended complaints. Thus, the Seventh Circuit's comment was inaccurate and its decision was not only contrary to State law but was anomalous in view of its previous rulings in *Travelers, Hebel* and *Beardslee* cited in Point III of this Petition.

It is respectfully submitted that the Seventh Circuit focused undue attention on tangential aspects of this litigation and overlooked an essential thrust of the Widow's position. Therefore, *certiorari* should be granted.

III.

THE SEVENTH CIRCUIT'S DECISION IGNORES THE CONTROLLING SIGNIFICANCE OF THE WIDOW'S STATUS AS SOLE BENEFICIARY POSSESSED OF A VESTED RIGHT TO PROMPT PAYMENT UNDER STATE LAW.

The Seventh Circuit acknowledged at page 2 of its opinion that the Widow is the uncontested sole beneficiary of the proceeds. However, it then went on to overlook its prior rulings in *Travelers Life Insurance Company v.*

Daniels, 667 F.2d 572 (7th Cir. 1981); *John Hancock Mutual Life Insurance v. Beardslee*, 216 F.2d 457 (7th Cir. 1954) and *Hebel v. Ebersole*, 543 F.2d 14 (7th Cir. 1976).

In *Travelers*, it was noted that a sole beneficiary obtains a *vested right to the proceeds and prompt payment thereof upon death.* Since Plaintiffs admit they were not beneficiaries nor parties to the policies, they enjoy no such contractual vested right. So, no basis exists in the record to warrant restraint of payment of the death benefits to the Widow. Here, as a matter of law, the Widow is the only party to the litigation with a *vested right to prompt payment*; and the absence of review permits an on-going deprivation of that right. Since none of the other litigants had nor demonstrated any superior right and dropped their "claim" to these specified proceeds, only the Widow was and remains immediately entitled to the present possession and use of these specific proceeds. *Kniffin v. Kniffin*, 119 Ill.App. 3d 106, 456 N.E.2d 659 (1983). See also, *Beardslee, supra.*

Furthermore, no true "stake" exists in the classical sense of interpleader terminology. This is so since the insurers did not respond to the Widow's motion for turnover, no Plaintiff filed an answer to the interpleader counterclaims nor any affidavit to contradict the Widow's affidavit, and no prayer for relief existed of record with regard to these specific funds. So, the Seventh Circuit's ruling has the improvident effect of shifting the burden of proof from the "R.I.C.O." plaintiffs to the defendant Widow who was at all times and remains the sole vested beneficiary. This judicial occurrence likewise violates the Widow's Fifth Amendment right to due process since her property is in actuality being held to assure the availability of leviable assets in the event Plaintiffs succeed on their damage claim.

This is especially unfair since Plaintiffs abandoned their original requests for injunctive relief yet have received the same *de facto* relief, i.e. prevention of the payment of proceeds due the Widow as a vested beneficiary as of the date of the filing the proof of loss under the contractual provisions of a policy of life insurance which provide for prompt payment to the Widow upon death of her husband. They accomplished this result through bald allegations without having to shoulder any burden or present any proof. The practical effect of this maneuver was to "ensure the availability of the substantive relief sought in the suit", i.e. ordinary money damages. This is impermissible whether by ploy or injunction. *Feit, supra,* at pp. 412-413; see also *Fuentes* and *Buckley, supra,* and *Exchange National Bank of Chicago v. Harris,* 126 Ill.App. 3d 382, 466 N.E.2d 1079 (1984). Moreover, in *Ashland Oil, Inc. v. Gleave,* 540 F.Supp. 81 (1982) and *Kaushal v. State Bank of India,* 556 F.Supp. 576 (N.D. Ill. E.D. 1983) it was held that equitable relief is not available in civil "R.I.C.O." actions brought by private citizens. Thus, the propriety of the continued deprivation of a present possessory interest in substantial assets to which the Widow had and continues to have a vested right to payment under the policies and State law (now pragmatically restrained and attached under the mere guise of a consequential "interpleader") warrants review by this Court.

IV.

THE SEVENTH CIRCUIT'S DECISION IGNORES THE FACT THAT PLAINTIFFS FAILED TO STATE AN INTEREST IN THE INSURANCE PROCEEDS UNDER ILLINOIS LAW.

The Seventh Circuit has held that in a federal action seeking to contest the named beneficiary's right to proceeds of life insurance, Illinois law must be applied. It

so held in *Travelers Life Insurance Company v. Daniels*, 667 F.2d 572 (7th Cir. 1981):

> In deciding who is entitled to the proceeds of the policy, this court must apply Illinois law. See *Continental Assur. Co. v. Platke*, 295 F.2d 571, 573 (7th Cir. 1961); *Prudential Ins. Co. v. Moore*, 145 F.2d 580, 583 (7th Cir. 1944), *cert. denied*, 324 U.S. 849, 65 S.Ct. 686, 89 L.Ed. 1409 (1945). In Illinois, as a general rule, the named beneficiary of a life insurance policy obtains a vested right to the proceeds upon the death of the insured. *Bank of Lyons v. Schultz*, 22 Ill.App. 3d 410, 318 N.E.2d 52, 57 (1974). On this basis, the district court here ruled in favor of the named beneficiaries.

Under Illinois law, as stated in *Bank of Lyons v. Schultz*, 22 Ill.App. 3d 410, 318 N.E.2d 52 at 56 (1974), followed by the Seventh Circuit in *Travelers*, it was held:

> The present action was begun as a creditor's suit. . . . It is recognized, both in Illinois and elsewhere, that the proceeds of life insurance are not an asset of the insured and that, in fact, they do not come into existence until after his death. (Vieth v. Chicago Title & Trust Co. (1940), 307 Ill.App. 99, 30 N.E.2d 126; 2A Appleman, Insurance Law and Practice, Sec. 1341 (1966).) Thus it seems clear that no lien could have attached to the proceeds of the policies at the time that the plaintiff commenced its suit because they were neither in existence nor an asset of the debtor. . . .
>
> Furthermore, *the rule is that immediately upon the death of an insured, the beneficiary named in the policy obtains a vested and absolute right to the proceeds*, which is subject only to contrary provisions in the policy. (Myers v. Modern Woodmen of America (1917), 205 Ill.App. 45; Hodalski v. Hodalski (1913), 181 Ill. App. 158; 2 Appleman, Insurance Law and Practice, Section 921 (1966).) Therefore Mary Schultz, who was the named beneficiary in the present policies, obtained an *absolute right to receive the proceeds im-*

> *mediately upon the death* of Alvin Schultz. Based upon this, it is our conclusion that the trial court was correct in finding that the proceeds were not subject to any lien in favor of the plaintiff and were the sole property of Mary Schultz. (Emphasis supplied.)

In *Bank of Lyons* it was held that the foregoing was true regardless of a creditor's allegations that the widow-beneficiary had conspired to defraud it. 318 N.E.2d at 57. Clearly, "R.I.C.O." cannot be used by a decedent's creditors as a magical elixir to circumvent a State's law, its public policy, or the Constitution's safeguards.

The fact noted by the Seventh Circuit that the "plaintiffs say . . . (that the decedent allegedly) used some of the money from the fraud to buy life insurance . . ." is irrelevant, immaterial and of no consequence since the doctrine of "equitable tracing" of premium payments is not a cognizable theory under Illinois law which is applicable here under Federal Rule of Civil Procedure 64 and since a "federal court may not substantially affect the enforcement of a right given by the State". *Bernhard v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203-4, 76 S.Ct. 273, 276, 100 L.Ed. 199 (1955). Furthermore, under *Fed. Rule Civ. Pro.* 64, attachment of property for the purpose of securing satisfaction of the judgment to be obtained is subject to the law of the State in which the district court is held. See *Granny Goose Foods, Inc. v. Teamsters*, 94 S.Ct. 1113, 1123 n. 19 (1974); *7 Moore's Federal Practice*, ¶¶ 64.01, 64.02.

Vieth v. Chicago Title & Trust Company, 307 Ill.App. 99, 30 N.E.2d 126 (1940), pronounces Illinois law on this point:

> The rule is, . . . and has been recognized by our Supreme Court that "the proceeds of life insurance are not an asset even to the insured. In fact, they do not come into existence until after death. During

> life the insured could not by any suit recover the proceeds, and claim them as his own. The creditor can have no right where the insured possessed none. A man's life is not property; of it he can make no gift; neither can he assign; nor can a creditor take it in payment of a debt. *The fund, called proceeds, which is created with and after the act of death is not such a fund as to which the equitable principle of tracing funds can be made to apply.* The funds known as proceeds are not created by any voluntary or wilful act of the insured, nor by any omission on his part, and that being so, fraud in the ordinary sense cannot be even shown or proven. The act of death usually is wholly involuntary and against the will of the insured, and the act of death in itself is not a fraud on anyone. (Emphasis supplied.)

Also, in *Cole v. Marple*, 98 Ill. 58 (1881), the Illinois Supreme Court further held that the State's exemption statute[3] should be liberally construed in favor of the purpose of its enactment and that recovery, if any, in the event of fraud by the decedent or his widow upon his creditors would be limited, even if insolvency were established, to recovery of only premiums paid plus interest during the period of actionable fraud. See also, *Houston v. Maddux*, 179 Ill. 377 (1899); *Hubbard v. Stapp*, 32 Ill.App. 541 (1889). *Accord: American National Bank of Okmulgee v. King*, 13 P.2d 164 (Sup.Ct.Okl. 1932); *Bennett v. Borough*, 116 S.E. 788 (Sup.Ct.Ga. 1923); *Bank of Lyons, supra.*

The Plaintiffs' conclusory allegation that the mentioned policies were purchased as a "result" of the alleged activity does not establish—even by employing an *avante guard* "R.I.C.O." theory—that they possess any superior right to assert a claim to the proceeds payable under these policies or restrain their proper payment. See *Schacht v. Brown*,

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[3] *Ill.Rev.Stat.*, Chapt. 73, § 850 (1986).

711 F.2d 1343, 1352 (7th Cir. 1983); *Exchange National Bank of Chicago v. Harris*, 126 Ill.App. 3d 382, 446 N.E. 2d 1079 (1984) (equitable attachment by injunction or otherwise not available in Illinois and is "abhorrent to the principles of equitable jurisdiction").

Likewise, the Plaintiffs failed to allege facts which would establish a sufficient causal connection between the alleged "scheme" and the realization of proceeds arising from the decedent's death since his death is merely mentioned in the Complaint as an occurrence *after* the supposed "wrongful" conduct complained of and not as any conduct violative of "R.I.C.O." See *Ray v. Karris*, 780 F.2d 636 (7th Cir. 1985). Life insurance death benefits are not, within the meaning of Section 1963(a)(1), proceeds, income or profits derived from a pattern of racketeering activity and are not an interest in the purported "enterprise" (decedent or his corporation) which are forfeitable. Further, the use of "R.I.C.O." forfeiture provisions are restricted to the government and are not available to a private civil "R.I.C.O." plaintiff. Here, such causal connection is not and cannot be plead; and therefore, an appeal should have been allowed to determine whether the Widow's death benefits should or should not have remained frozen.

Given that the deprivation visited on Mrs. Mueller finds no basis in the pleadings, the law, or the record, the refusal of the Seventh Circuit to allow review served to perpetuate a denial of due process and a vested present possessory interest in property and should be scrutinized by this Court.

V.

THE PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM DUE TO LACK OF SPECIFICITY OF FACTS AND CAUSATION MAKING THE JUDICIAL INTERFERENCE WITH PAYMENT WITHOUT THE POSSIBILITY OF A PROMPT APPEAL PARTICULARLY EGREGIOUS.

Plaintiffs' Complaint suffers from non-viability since it is replete with conclusory allegations and devoid of particularized factual allegations which state or could sustain a "R.I.C.O." claim. Not one specific predicate act on the part of the Widow is alleged. Federal Rule of Civil Procedure 9(b) creates an exception to notice pleading by requiring:

> . . . In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity.

Here, the Plaintiffs' mere use of conclusory words and terms do not suffice to create a cause of action. See *Beck v. Cantor Fitzgerald & Co., Inc.*, 621 F.Supp. 1547 (N.D. Ill. E.D. 1985); see also, *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp.*, 73 F.Supp. 721, 10 F.R.Ser. 23b.1 case 2 (D.C. D.C. 1947). Rule 9(b) is particularly applicable to "R.I.C.O." actions. *Chambers Development Company, Inc. v. Browning Ferris Industries*, 590 F.Supp. 1528 (D.C. W.D. Penn. 1984); see also, *Haroco, Schacht* and *Beck*,[4] *supra*. Recently in *Forty-Eight Insula-*

[4] In *Beck*, the recent comments of this Court concerning "strike suits" which have an obvious *in terrorem* purpose were noted together with the observations of other courts that "fraud is too serious a charge and litigation too expensive to allow the kind of tactics used here to occur; 'R.I.C.O.' even more so". Here, an on-going injustice is occurring as a result of the vague use of "R.I.C.O." for the very extortive and oppressive purpose "it was to combat". See *Sedima* and *Ashland Oil, Inc., supra*. See also, *Gordon v. Helmann*, 715 F.2d 531 (1983); *W.S.B. Electric Co. v. Rank & File Comm. to Stop the 2-Gate System*, 103 F.R.D. 417, 420-421 (1984).

tions, Inc. v. Robert E. Sweeney, Col, L.P.A., 63 B.R. 415 (D.C. N.D. Ill. E.D. 1986), it was held:

> . . . sufficient particularity under Rule 9(b) requires the complaining party to briefly flesh out the overall scheme to defraud and specifically aver the time, place, participants and substance of the allegedly false representations and state how the false representations advance the fraudulent scheme. See *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975) (holding Rule 9 requires a "brief sketch of how the fraudulent scheme operated, when and where it occurred and the participants"). Such specificity is required to protect individuals from broad and unfounded charges of fraudulent wrongdoing. The need to protect the reputations of individuals is just as acute, if not greater, in the RICO context where defendants are labeled "racketeers".

Here, the Plaintiffs' lament without particularity. They fail to detail any material misrepresentations or specify when or as to whom such were made and fails to particularize the time, dates or items of wire or mail fraud, or "abetting" and "conspiracy" only vaguely referred to contrary to the clear requirements of Rule 9(b). Moreover, neither two or more specific acts of wire or mail fraud nor reasonable reliance is adequately alleged which would support a "R.I.C.O." conviction. Therefore, the Complaint fails to state a cause of action. See *Pit Pros, Inc. v. Wolf*, 554 F.Supp. 284 (N.D. Ill. 1983); *Baronski v. Serhant*, 603 F.Supp. 232 (N.D. Ill. 1985); *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 at 405 (7th Cir. 1984); *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985); see also *Beck, supra* and *Sedima v. Imrex Co.*, 105 S.Ct. 3275 (1985).

The Plaintiffs have also failed to allege causation between any purported use of funds to "obtain" insurance and the harm they say they suffered. Moreover, the receipt of insurance proceeds to a widow due her by reason of her

husband's death was not "an activity which 'R.I.C.O.' was designed to deter". See Section 1962(c) and *Sedima, Haroco,* and *Schacht, supra.* The Widow's right to payment flows under contracts of life insurance, with respect to which Plaintiffs were not parties or beneficiaries by reason of the death of her late husband, Robert Mueller, and not by reason of any yet unspecified wrongdoing attributable to her. Under the scenario presented by the Plaintiffs, the whole subject of insurance is irrelevant and immaterial to their claims and should not have been injected into this lawsuit. A cursory view of the prayers contained in the Plaintiffs' Complaint reveal that no relief is sought with respect to the policies of insurance listed therein.

It would be preposterous to conclude that the Widow "invested in" or "conducted an enterprise" (her late husband according to the tendered Complaint) "through a pattern of racketeering activity" by being his Widow and the beneficiary of life insurance benefits. See *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384 at 402 (7th Cir. 1984).

Clearly, therefore, the Plaintiffs do not state sufficient facts to state a viable private "R.I.C.O." claim or overcome State property or insurance law; nor does their tortured use of "R.I.C.O." authorize the imposition of equitable relief or interference with the beneficiary's right to receive the proceeds of the policies now held by the court since the creation of those proceeds is, as a matter of law, a mere coincidence of death rather than an intended result of any possible alleged activity of the decedent's Widow.

It is submitted that the clanging deficiency of the pleadings in this case is a factor which the Seventh Circuit should have but did not consider in conjunction with the due process issue before it prior to arriving at a conclusion that it did not possess appellate jurisdiction.

Given the foregoing, the district court's ruling and its unfair result should have been promptly reviewed by the Seventh Circuit.

CONCLUSION

For the foregoing reasons and in view of the novel, basic, and important constitutional issues presented as well as the conflicting interpretations of appellate jurisdiction which now live amongst the circuits and must be resolved, *certiorari* should be granted.

Respectfully submitted,

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November, 1986

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1729

BERNARD UEHLEIN, et al.,

Plaintiffs-Appellees,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY, et al.,

Defendants.

Appeal of:

SHIRLEY A. MUELLER and GREGORY A. JENNINGS,
Executor of the Estate of Robert V. Mueller.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 8875—**Hubert L. Will,** *Judge.*

SUBMITTED MAY 27, 1986—DECIDED JUNE 25, 1986

Before CUMMINGS, *Chief Judge,* and EASTERBROOK and RIPPLE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* The plaintiffs say that they were defrauded by Robert V. Mueller, that the fraud violates the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-68, that Robert Mueller used some of the money from the fraud to buy life insurance, and that they are therefore entitled to the proceeds of the policies now that Robert Mueller has died. Shirley

Mueller, Robert's widow and the sole beneficiary of more than $4.5 million in life insurance, also wants the proceeds. The insurers deposited the proceeds in court under 28 U.S.C. §1335 with a request that the judge decide who gets the money.

Shirley Mueller contests the RICO suit on the merits, but she also wants the money in the interim. She asked the district judge to turn the proceeds (with interest, now more than $5 million) over to her, contending that she had been forced to sell the family home and take up employment as a clerk in a department store "in order to survive and finance her daughters' education, not to mention her need to defend this novel and complex litigation and its ruinous impact." In a brief minute order the district judge denied her motion to dismiss the complaint and her motion "for immediate hearing and ruling". The court also denied her motion to obtain the $5 million. In open court the judge invited her to make a less ambitious motion seeking any funds in excess of the amount claimed by the plaintiffs. As Mrs. Mueller puts it in her memorandum on jurisdiction: "Rather than supplicate herself . . . the widow has filed her notice of appeal seeking review by this Court of the district court's ruling, which she respectfully submits is tantamount to an injunction holding hostage her husband's death benefits until the district court is satisfied as to the ultimate disposition of all claims." She also indirectly relies on the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), with which we begin.

The order retaining the proceeds in the court's possession does not finally dispose of the litigation. Much lies ahead—that is the premise of Shirley Mueller's request to have the money now rather than (if she prevails) at the end of the litigation. Her position is, however, superficially similar to that of the plaintiff in *Cohen*, who appealed when instructed to post a bond to secure the costs of litigation. The dispute about the bond, like the dispute in this case, concerns who shall hold a sum of money—a party or the court—during the course of the litigation. The

Supreme Court termed the order to post a bond an appealable collateral order because the order finally resolved a dispute unrelated to the merits and was effectively unreviewable after a final judgment. (Even if the order to post the bond had been erroneous, this would not have been a good reason to reverse any judgment on the merits.) Perhaps the denial of a motion to pay out the proceeds is collateral in the same sense. Surprisingly, apparently no reported decision addresses the question whether a refusal to turn over the proceeds in an interpleader action is an appealable collateral order.

An order is collateral within the meaning of *Cohen* only if it finally resolves the subject in dispute, is independent of the merits, and is not effectively reviewable on appeal from the final judgment. *Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757 (1985); *In re Schmidt*, 775 F.2d 822 (7th Cir. 1985). Although this case, like *Cohen*, involves the custody of money pending decision, it meets none of the requirements. It is not final because the district judge may reconsider as the case progresses. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.11 (1978); *In re UNR Industries, Inc.*, 725 F.2d 1111, 1120-21 (7th Cir. 1984); cf. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 12 n.14 (1983). The judge invited one form of reconsideration—a request for less than the whole fund. The court might reconsider even the request for the whole thing if, as the litigation progresses, it becomes likely that Shirley Mueller will prevail. A judge unwilling to pay out the stakes of the case before delving into the merits may be more willing as his knowledge increases. This consideration also shows why the second requirement, independence of the merits, is not satisfied. Be his case good or bad, the plaintiff in *Cohen* had to post a bond. Mrs. Mueller, in contrast, may get the money if she persuades the district judge that she has a good case. An appellate court could not evaluate the district court's decision without deciding who is likely to prevail on the merits. Mueller invites us to do this, but the policy against piecemeal appellate litigation em-

bodied in the "final decision" rule of 28 U.S.C. §1291 bars the way.

The third requirement, effective unreviewability on appeal, also distinguishes this case from *Cohen*. True, if the judge has erred in refusing to turn the funds over, this will not be a reason to reverse any judgment on the merits, just as in *Cohen* an error concerning the bond would not have affected the judgment. But if the refusal to turn over the funds was in error, this will not necessarily hurt Shirley Mueller. If she loses on the merits, she is not entitled to all the money now or ever. If she wins she receives the fund, together with interest. The interest compensates her for the delay. The plaintiff in *Cohen* had to pay a bonding company for the bond; this premium was not recoverable. Mueller argues that she suffers an injury in the interim because she has sold her house and gone to work. This is not different in kind, however, from the hardship many litigants endure during a lawsuit. Ongoing litigation may induce people to sell assets or go to work to pay counsel while meeting life's other obligations. Many interim orders, especially discovery orders, may have significant effects on the cost of litigation and on parties' control of their lives. They may be directed to show up for interrogation or to pay to reproduce documents. If this sort of effect were enough to make the order appealable, we would be deluged with interlocutory appeals, each arguing that prompt review could end the litigation (and the sacrifice) sooner.

Every case has housekeeping and discovery orders, many of them costly to the litigants. They are not appealable just because expensive. See *Tenneco Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1378-79 (7th Cir. 1985); *Kapco Mfg. Co. v. C & O Enterprises, Inc.*, 773 F.2d 151 (7th Cir. 1985). What is at stake here is money now versus money later, and this difference is not the sort of irreparable harm that is effectively unreviewable on appeal. *Mulay Plastics, Inc. v. Grand Trunk Western R.R.*, 742 F.2d 369 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1409 (1985). Mrs. Mueller may have an easier time than other litigants ag-

grieved by the costs of litigation. She is entitled to the $5 million if she wins, and perhaps to some of the fund even if she loses; if she can persuade a third party that her legal position has merit, she will be able to sell or borrow against her interest in the fund. Whether she can borrow or not, however, she must rely on the discretion and good sense of the district court, and not on appellate review, to adjust the hundreds of disagreements on the road to judgment in any significant litigation.

It does not help to recharacterize the judge's decision as the denial of an injunction appealable under 28 U.S.C. §1292(a)(1). The order does not compel anyone to do anything, and it is odd to think of the court's refusal to instruct its clerk to pay money as a "denial of an injunction." During any litigation someone holds the stakes. Usually that someone is the defendant. The plaintiff in a tort suit could not get immediate appellate review by filing a motion for an order requiring the defendant to pay up immediately. Section 1292(a)(1) is designed to allow prompt appeals of decisions on the merits, and this purpose informs the definition of "injunction." Only an order effectively on the merits, coupled with an irreparable effect on the merits, amounts to the grant or denial of an interlocutory injunction. *Carson v. American Brands, Inc.*, 450 U.S. 79, 84-86 (1981); *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Donovan v. Robbins*, 752 F.2d 1170, 1173-74 (7th Cir. 1985). If the stratagem of asking for a turnover of assets from a party as part of an immediate judgment will not produce an appealable order, then a request to pay out assets within the court's control also does not yield an appealable denial of "injunctive" relief. *Guerin v. Guerin*, 239 F.2d 909, 913 (9th Cir. 1956).

Mrs. Mueller relies principally on *In re Feit & Drexler, Inc.*, 760 F.2d 406, 411-13 (2d Cir. 1985), which took jurisdiction of an interlocutory appeal from an order forbidding a party to the litigation to transfer certain property and requiring the party to deposit other property with an escrow agent. We need not decide whether to

follow this case, in which the order seemingly had little to do with the merits and therefore has a questionable pedigree as a preliminary "injunction" under *Switzerland Cheese* and *Carson*. See also, e.g., *I.A.M. National Pension Fund Benefit Plan v. Cooper Industries, Inc.*, 789 F.2d 21 (D.C. Cir. 1986) (order to make overdue pension fund contributions during litigation is not an injunction); *Groseclose v. Dutton*, 788 F.2d 356 (6th Cir. 1986) (an order to draw up plans for a remedy is not an injunction). Any order concerning discovery could be recharacterized as an "injunction to turn over documents" unless courts are careful about the scope of §1292. See C. Wright, *The Law of Federal Courts* 550-51 (4th ed. 1983); *Hayes v. Allstate Insurance Co.*, 722 F.2d 1332, 1341 (7th Cir. 1983) (dissenting opinion) (collecting cases). In this case, however, neither a party nor a stranger to the case has been ordered to turn anything over to anyone else, and no one has been restrained from using his property as he pleases. Mrs. Mueller is in the same position she would be in if the insurance companies had held onto the money pending the disposition of the litigation. For the reasons we have given, the denial of one litigant's request to compel another litigant to surrender the stakes of the case is not the denial of an injunction or otherwise appealable. We need say no more to hold that the appeal here must be

DISMISSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 13, 1986.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

BERNARD UEHLEIN, et al.,

Plaintiffs-Appellees,

No. 86-1729 v.

JACKSON NATIONAL LIFE INSURANCE COMPANY, et al.,

Defendants.

Appeal of:

SHIRLEY A. MUELLER and GREGORY A. JENNINGS,
Executor of the Estate of Robert V. Mueller.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 8875—**Hubert L. Will**, *Judge.*

ORDER

The appellants filed a petition for rehearing and suggestion of rehearing en banc on July 9, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

April 24, 1986

Judge Hubert L. Will No. 84 C 8875

Uehlein -v- Jackson National Life

* * * * *

DOCKET ENTRY: * * * Defendants' motions for immediate hearing and ruling, judgment on interpleader counterclaims, turnover order, and severance are denied. Defendants' motion to dismiss is denied.

* * * * *

Supreme Court, U.S.
FILED
DEC 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-786

In The

Supreme Court of the United States

October Term, 1986

BERNARD UEHLEIN, et al.,

Respondents,

JACKSON NATIONAL LIFE INSURANCE COMPANY, et al.,

Respondents,

Appeal of:

SHIRLEY A. MUELLER and GREGORY A. JENNINGS, Executor of the Estate of Robert V. Mueller, Deceased,

Petitioners.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the District Court's denial of Petitioners' Motion For Judgment on Interpleader Counterclaims, and Order Terminating Escrow and Directing Court-Appointed Escrowee to Distribute and Turn-Over Insurance Proceeds and Earnings thereon is an order appealable under 28 U.S.C. Section 1291 or 1292.

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No. 86-786

In The
Supreme Court of the United States
October Term, 1986

BERNARD UEHLEIN, et al.,
Respondents,

JACKSON NATIONAL LIFE INSURANCE COMPANY, et al.,
Respondents,

Appeal of:

SHIRLEY A. MUELLER and GREGORY A. JENNINGS, Executor of the Estate of Robert V. Mueller, Deceased,
Petitioners.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, ARTHUR J. TONNESEN and ELAINE D. TONNESEN, JOSEPH and MARY SHEKLETON, THOMAS WEISBRUCH, DAVID E. and KIM E. BORN, GUS B. and BILLIE L. NEILL, LYNN BLAND, and JAMES and CAROLYN HANSEN, (herein referred to as "Investors") respectfully submit this Memorandum

in response to the Petition for Writ of Certiorari filed by Petitioners SHIRLEY A. MUELLER (herein "Ms. Mueller") and GREGORY A. JENNINGS, as Executor of the Estate of Robert V. Mueller, deceased.

OPINION BELOW

On June 25, 1986, the United States Court of Appeals for the Seventh Circuit dismissed this appeal for lack of jurisdiction and the opinion is officially reported at 794 F.2d 300(CA 7 1986).

JURISDICTION

Petitioners allege that jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case presents the question of whether the district court's order of April 24, 1986 is an appealable order pursuant to 28 U.S.C. sections 1291 and 1292(1985). The Petitioners have also raised peripheral issues concerning the United States Constitution, Amendment V and 18 U.S.C. secs. 1961-1968(1985).

STATEMENT OF THE CASE

Since 1979, the Investors had been solicited by Robert V. and Shirley A. Mueller to invest in tax-sheltered medical and hospital equipment. As a result of the Muellers' repeated representations of the profitability and safety of these medical equipment investments, Investors continued to invest and reinvest substantial sums of money with the Muellers and New Horizon Enterprises, Inc. In actuality, the Muellers acted in concert to fraudulently obtain the Investors' money by using one Investor's money to pay another Investor his or her profits and investment principal. Over the course of several years, the Muellers maintained this "Ponzi" or "kiting" scheme without making a single legitimate investment in medical or hospital equipment.

On July 5, 1984, Robert V. Mueller died in Texas of a self-inflicted gunshot wound, leaving Ms. Mueller sole beneficiary on three life insurance policies with the Jackson National Life Insurance Company, Investors Guaranty Life Insurance Company and General American Life Insurance Company, totaling 3.6 million dollars. After Robert Mueller's suicide, the Investors learned that their investments made with Robert and Shirley Mueller had been fraudulently diverted by Mr. & Mrs. Mueller for their own personal use, including the making of payments on the life insurance premiums of the above policies.

In October, 1984, a group of investors filed a lawsuit in the United States District Court for the Northern District of Illinois against the Estate of Robert V. Mueller; Shirley A. Mueller; New Horizon Enterprises, Inc.; and the three life insurance companies, Jackson National Life Insurance Company, Investors Guaranty Life Insurance Company and General American Life Insurance Company. The Complaint alleges three counts against the above-mentioned Defendants. Count I alleges that Petitioners through their corporation, New Horizon Enterprises, Inc., conspired and combined to defraud the Investors of their funds in violation of the federal *Racketter Influenced and Corrupt Organizations Act* (herein "RICO"). 18 U.S.C. Sections 1961 - 1968, 1962(c), 1963(a)(i).

Counts II and III of the Complaint are pendent state claims that allege further violations of the *Illinois Consumer Fraud Act.* (*Ill. Rev. Stat.,* ch. 121 1/2, Section 262(1986). The Complaint requests money damages, reasonable costs, attorneys fees, as well as an accounting of the assets of Petitioners' solely owned corporation, New Horizon Enterprises, Inc.

In January, 1985, the three Defendant insurance companies filed Counterclaims for Interpleader Relief and moved the District Court to appoint an escrow agent to accept deposit of the 3.6 million dollars in life insurance

proceeds at issue in this case. On May 25, 1985, the district court appointed Exchange National Bank as escrow agent and the deposited funds were to be invested by the bank during the pendency of this litigation.

In December , 1985, a full fourteen months after the filing of the lawsuit, and eleven months after the filing of the interpleader actions, the Petitioners presented the following four motions to the district court; 1) Motion for Judgment on the Interpleader Claims and Termination of Escrow; 2) Motion for Severance; 3) Motion for an Order terminating Escrow and Directing Court-Appointed Escrowee to Distribute and Turn Over Insurance Proceeds and Earnings Thereon; and 4) Motion for a Prompt Hearing and beseeched the court to release the escrowed funds due to the financial hardship on the part of Ms. Mueller and her "minor daughters".[1] The Investors filed a Response to Petitioners' Motions on and the district court denied Petitioners' motions on April 24, 1986. However, the district court indicated that it would entertain a motion by Petitioners for a *partial* turn-over upon an adequate showing of hardship on the part of Ms. Mueller and her "minor daughters". The district court refused to certify this issue for immediate appeal to the United States Court of Appeals for the Seventh Circuit as provided under Section 1292(b) and pre-trial discovery continued as ordered.

Petitioners filed a Notice of Appeal ordered on May 7, 1986 with the Seventh Circuit, challenging the district court's denial of their motion to turn-over the assets. First, Petitioners argued that the district court's denial of their motion was *in effect* a denial of an injunction which is appealable pursuant to 28 U.S.C. Section 1292(a)1. Second, Petitioners argue that their Motion for Turnover constituted a request for a mandatory permanent injunction,

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[1] In actuality, Ms. Mueller only had one daughter currently under the age of eighteen.

thus empowering the Court of Appeals to accept their immediate appeal pursuant to Section 1292. The Seventh Circuit dismissed the Petitioners' appeal for lack of jurisdiction on May 25, 1986 stating; 1) the Court's denial did not constitute an order reviewable as a collateral order doctrine under *Cohen vs. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L.Ed.2d 1528, 69 S.Ct. 1221(1949); and 2) Mueller's Motion was not an "injunction" appealable under Section 1292. A review of the facts and circumstances of this case supports the Seventh Circuit's dismissal of this Appeal.

REASONS FOR DENYING THE WRIT

I. The District Court's April 24, 1986 Denial of the Petitioners' Motion For Full Turn-Over Is Not Appealable Under 28 U.S.C. Sections 1291 and 1292.

The sole question on appeal to this Court is whether the district court's order of April 24, 1986 denying Mueller's request to turn over the insurance proceeds deposited with a third-party escrowee. Sections 1291 and 1292 of the United States Code limit the appealability of district court orders to all final orders as defined in Section 1291 and a small number of interlocutory orders outlined in Section 1292. (28 U.S.C. Sections 1291 and 1292 (1985). In the Seventh Circuit's June 25, 1986 opinion in this matter, the Court ruled that the Petitioners had failed to demonstrate that the denial of the motion was appealable under either Section 1291 or 1292, prompting this Petition for a Writ of Certiorari on the part of the Petitioners.

It is well settled under law that there is no right to review by this Court, but is a matter of judicial discretion based on the reasons offered in support of review.

Petitioners have stated in their Petition that the Seventh Circuit's decision to dismiss this appeal creates a conflict among the circuits and must be reviewed. (Petitioners' *Brief* at pages 7-18). However, it is well

settled in *all circuits* and before this Honorable Court that orders of this nature are *not* appealable under either Section 1291 or 1292 and no such conflict exists. Therefore, this petition for review must be denied.

A. Section 1291

Section 1291 limits federal appellate court jurisdiction to all "final decisions" of the district courts of the United States. Congress intended to limit the jurisdiction of federal appellate courts to prevent the piecemeal appellate review of cases and to promote efficient and thorough judicial administration of cases. *United States vs. Hollywood Motor Car Co.*, 458 U.S. 263, 73 L.Ed.2d 754, 102 S.Ct. 3081(1982); *Firestone Tire & Rubber Co. vs. Risjord*, 449 U.S. 368, 66 L.Ed.2d 571, 101 S.Ct. 669(1981). "Final decision" is defined a district court decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment". *Catlin vs. United States*, 324 U.S. 229, 89 L.Ed.2d 911(1975). The order before this court does *not* constitute a final decision under Section 1291.

Petitioners in their Motion for Turn-Over requested the district court to order the third-party escrowee, Exchange National Bank, to release the 3.6 million dollars of insurance proceeds *prior* to any decision on the merits of the Investors' claims. These insurance proceeds had been deposited by Defendant insurance companies after the filing of their interpleader counterclaims and pursuant to a May 25, 1985 court order designating Exchange National bank as the third-party escrowee. The district court placed these funds in escrow after reviewing the Investors' complaints which detailed the fraudulent medical investment scheme of the Muellers and how they had diverted these funds for their benefit, using part of the funds to pay premiums on the life insurance policies on the life of Robert V. Mueller. As an active participant in this investment scheme, Ms. Mueller would receive 3.6 million dollars as a

result of her fraudulent representations. The district court, fully cognizant of the Investors' claims and Petitioners' denials, deposited the money in escrow where it earns interest to this day pending a final outcome to this litigation. In the absence of a final determination of the merits of the Investors' claims against the Petitioners, the district court's April 24, 1986 order is not a final decision as mandated by this Court in *Catlin, supra.*

An exception to the "final decision" requirement of Section 1291 was articulated by this Court in *Cohen vs. Beneficial Loan Corporation,* 337 U.S. 541, 93 L.Ed.2d 1528, 69 S.Ct. 1221(1949). This Court recognized that there exists a *small class* of orders that are separable from, and collateral to, the primary rights asserted by the parties in any action. 337 U.S. 541, 546. At times, it is necessary to rule these orders appealable due to their importance to the litigation, as well as their independent status to the primary cause of action. Thus led to the birth of the "collateral order" exception to the final decision rule of Section 1291.

This Court has ruled time after time that the collateral order exception is very narrow and must only be invoked where the rights involved will be irretrievably lost without immediate review. *Firestone, supra.* At a minimum an appealable non-final order under the collateral order doctrine must:

"1) conclusively determine the disputed question;

2) resolve an important issue completely separate from the merits of the action; and

3) be effectively unreviewable on appeal from a final judgment."

Coopers & Lybrand vs. Livesay, 437 U.S. 463, 57 L.Ed.2d 251, 98 S.Ct. 2454(1978).

In *Coopers & Lybrand, supra.,* the court ruled that a lower district court order decertifying a Rule 23 class

was not a final decision appealable under the collateral order exception to Section 1291. Plaintiff in *Coopers and Lybrand* filed a securities fraud action on behalf of all other similarly situated purchasers to recover money damages. The district court decertified the class and plaintiff-investor appealed its order arguing that the court's action sounded a "death knell" to the litigation since the plaintiff would find it "financially imprudent" to litigate his claim to final judgment without a possible group recovery. 437 U.S. 463, 468. The court refused to hold the order appealable under the collateral order doctrine. 437 U.S. 463, 475. This Court has reaffirmed the *Coopers & Lybrand* test in *Richardson-Merrell, Inc., vs. Koller,* 472 U.S.___, 86 L.Ed2d 340, 105 S.Ct.___(1985).

The Seventh Circuit's application of this Court's *Coopers & Lybrand* test in the instant case is totally consistent with the standards set by this Court and does not create a conflict among the circuits. Rather, the Seventh Circuit's decision in *Uehlein* is a reaffirmation of the basic tenets of law underlying the "final decision" requirement of Section 1291. To allow the Petitioners an opportunity to appeal this non-final interlocutory order without the proper district court certification would require an appellate court to review the merits of a case prior to any lower court decision. As Judge Easterbrook noted an "appellate court could not evaluate the district court's decision without deciding who is likely to prevail on the merits." *Uehlein, et al. v. Jackson National Life Insurance Company, et al.,* 794 F.2d 300, 302(1986).

First, the decision by the trial court to deny Petitioners' motion was not final on the issue of disbursement. The district court judge in denying the Petitioners' motion for a turn-over of *all* the proceeds currently held in escrow, stated that the Petitioners were free to petition him at any time for a *partial* disbursement from the escrow fund if indeed Ms. Mueller was facing a great financial hardship. The Petitioners declined to petition the court and

filed their Notice of Appeal with the U.S. Court of Appeals for the Seventh Circuit.

Second, Mueller has failed to demonstrate that the disbursement of the 3.6 million dollars in insurance proceeds currently on deposit with Exchange National Bank is independent of the merits of this case. The Investors' claims in this matter are against Ms. Mueller, the Estate of her deceased husband, Robert V. Mueller and their solely-owned corporation, New Horizon Enterprises, Inc. for the fraudulent representations made by all three Defendants with regard to the Investors' tax-sheltered investment of money in medical equipment. This action is *not* merely an attempt to seize a widow's assets to satisfy claims against her husband, but an action against a husband and wife team that conspired to fraudulently solicit funds from unsuspecting investors and divert these funds for their private use which included the payment of all life insurance premiums on the policies at issue. Possession of the escrowed funds is the heart of the Investors' claims, thus the order entered by the district court is not "collateral" in nature but a an attempt by Petitioners to obtain judgment prior to any ruling on the merits of this case.

Finally, the District Court's decision will not go unreviewed upon the entrance of final judgment of this matter. Petitioners requested the district court to issue an order vesting Ms. Mueller with total control of the insurance proceeds without any ruling on the merits of the Investors' claims to the money. This is the precise question at issue in the primary action of this case – who is entitled to these funds. To argue as Petitioners have, that the district court's order denying the disbursement of the escrowed funds is independent of the cause in chief, is unfounded. The party that wins on the merits of their claim will be entitled to recover the insurance proceeds plus any interest accrued during the pendency of the litigation.

Thus, the District Court's order denying the turn-over of the escrowed proceeds to Petitioners does *not* fall under the narrow collateral order doctrine under *Cohen, supra.* The sole allegations of irreparable hardship by Petitioner include the loss of money and the large expense involved in litigating this matter. (Petitioners' *Brief* at pages 5-6). The Court in *Richardson-Merrell, supra.* recently spoke to the Petitioners' concerns:

> "...the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress. (Citations omitted)... The *Coopers & Lybrand* test *looks not to the litigation expense imposed by a possible erroneous ruling, but rather to whether the right affected by the ruling can and should be protected by appeal prior to judgment.*" 86 L.Ed.2d 340, 350. (Emphasis added.)

The Investors state that Petitioners' claim to these proceeds are adequately protected and that the Petition for Writ of Certiorari must be denied.

As evidence of a conflict between the circuits, Petitioners cite to the Second Circuit case *In Re Feit & Drexler, Inc.*, 760 F.2d 406(CA 2 1985), in support of their request for immediate appeal alleging that the same identical interests are present in the instant case. *Feit* is totally distinguishable from this case on one very important point. In *Feit*, the district court's order that was appealed from was within the category of *injunctive orders* appealable under Section 1291 and 1292. The prejudgment relief sought by the wife in *Feit* took the form of a mandatory preliminary injunction. In the instant case, no such injunctive relief was requested. The Seventh Circuit stated specifically that the wife in *Feit* had established a final appealable order under Section 1292(a) 1. 760 F2d 406, 411. Thus, *Feit* is inapplicable to the facts of the instant case. See also; *Brown vs. Kerr-McGee Chemical Corporation*, 767 F 2d 1234(CA7, 1985), *cert denied*, 106 S.Ct

1378 (1986).

The Seventh Circuit's dismissal of Petitioners' appeal for lack of jurisdiction is in total compliance with the mandates outlined by this Court and certiorari should be denied.

B. Section 1292

Congress adopted Section 1292 as an exception to the 'final decision' limitation, and the statute provides appeal as of right from interlocutory orders of district courts "... granting, continuing modifying, refusing or dissolving injunctions." 28 U.S.C. Section 1292(a)1(1985). As an exception to the final decision requirement, Section 1292(a)1 has been narrowly construed by this Court. *Carson vs. American Brands, Inc.*, 450 U.S. 79, 67 L.Ed 2d 59, 101 S.Ct. 993(1981); *Baltimore Contractors, Inc. vs. Bodinger*, 348 U.S. 176, 99 L.Ed. 233, 75 S.Ct. 249(1955). The statute requires the litigant to 1) demonstrate a valid appealable interlocutory order under Section 1292(a)1; and 2) that the order would have a serious, perhaps irreparable, consequence without immediate review, *Carson, supra.* 450 U.S. 79, 86. Petitioner cannot establish either requirement under Section 1292(a)1, thus the district court's order in the instant case is not appealable under Section 1292(a)1.

Petitioners filed a Motion to Turnover Assets with the court in December, 1985, a full fourteen months after the original complaint was filed and twelve months after the filing of the interpleader counterclaims by the Defendant insurance companies. At no time did Petitioners file for an injunctive order appealable under Section 1292(a)1. Absent a valid interlocutory order that is appealable pursuant to Section 1292, Petitioners may not appeal the district court's order as a matter of right.

In addition, Petitioners have failed to demonstrate *any* serious or irreparable harm that would justify the piecemeal appellate review of her claim. The original

complaint was filed by the Investors in October, 1984. Interpleader counterclaims were filed by Defendant insurance companies in January, 1985, with the court's order depositing the insurance with Exchange National Bank issued on May 25, 1985. Yet Petitioners did not file their Motion for Turn-over until December, 1985 – some fourteen months after the original complaint. If the deprivation to Petitioner Mueller is so serious or irreparable, why did they wait fourteen months to request the funds be turned over? Petitioners' protestations of hardship and deprivation of the use of the insurance proceeds hardly constitutes "irreparable harm" when Petitioner will receive the entire amount plus interest if she is successful in defending this action. Historically, money damages are insufficient under law to establish irreparable harm. *Mulay Plastics, Inc. vs. Grand Trunk Western Railroad*, 742 F.2 369 (CA7 1984), *cert. denied*, 105 S.Ct. 1409 (1985). In the event she is successful at trial, Petitioner shall receive all of the proceeds plus interest, thus the inaccessibility of the proceeds to Ms. Mueller does not seriously or irreparably affect Petitioners' rights under law. *Switzerland Cheese Ass'n, Inc. vs. E. Harris' Market, Inc.*, 385 U.S. 23, 17 L.Ed. 2d 23, 87 S.Ct. 193(1966). Absent allegations of irreparable harm, Petitioner has no right to appeal the district court's order.

Section 1292(b) also permits the appeal of district court orders upon a finding by the judge that there exists 1) a controlling question of law present where a substantial ground for a difference of opinion exists; and 2) an immediate appeal of such order would materially advance the ultimate termination of the case. 28 U.S.C. Section 1292(b)(1986). All orders seeking jurisdiction under Section 1292(b) *must* demonstrate that the district court entered a certificate of appeal. In *Cooper vs. Lybrand vs. Livesay, supra,,* this Court reaffirmed the need for certification to *prevent* the unnecessary and piecemeal use of the appellate process:

> "Non-final orders could never be appealed as a matter of right. Moreover, the discretionary power to permit an interlocutory appeal is not, in the first instance, vested in the courts of appeals. A party seeking review of a non-final order must first obtain the consent of the trial judge. This screening procedure serves the dual purpose of ensuring that such review will be confined to appropriate cases . . . "

See also: *U.S. vs. 687.30 Acres of Land, More of Less, in Dakota and Thuston Counties, State of Nebraska*, 451 F.2d 667(CA 9 1971), *cert. denied*, 92 S.Ct. 1291(1971). Without a certified question by the district court, the appeals court has no jurisdiction. The district court refused to certify this order as appealable under Section 1292(b) stating that it was not a final determination on any issue before the court. No basis for appeal can be formed under Section 1292(b).

In sum, Petitioners have failed to establish that the district court's denial of their Motion to Turn-over the escrowed insurance proceeds is appealable under Section 1292. Accordingly, certiorari must be denied.

II. The District Court's April 24, 1986 Denial of the Petitioners' Motion For A Full Turn-Over Is Not in Violation of their Due Process Rights.

The sole issue on appeal before this Court is whether the district court's April 24, 1986 order refusing to turn over the escrowed money is a final appealable order under Sections 1291 and 1292 of the United States Code. Yet throughout their Petition, the Petitioners argue that the court has in some way deprived Ms. Mueller of her Fifth Amendment due process rights to these proceeds. *(Petition* at pages 7-25). As argued in Section IA and B of this Response, the order is *not* appealable under either Section 1291 or 1292 and the Seventh Circuit's dismissal of this appeal was perfectly consistent with the law as enunciated by this Court. Further arguments on the merits of the

Investors or the Petitioners' claims must wait until a decision on the merits by the district court has been issued. No decision on Ms. Mueller's rights as sole beneficiary of the life insurance proceeds has been made by the district court and her arguments are improper at this time.

In their Petition, it is argued that Ms. Muellers' status as sole beneficiary under her husband's life insurance policies is absolutely protected by Illinois law, specifically section 850 of the *Illinois Insurance Code. (Ill. Rev. Stat.* ch. 73, par. 850(1985). Section 850 exempts life insurance proceeds from "execution, attachment, garnishment, or other process, for the debts of the insured." The Petitioners have completely mischaracterized Ms. Mueller's position in this lawsuit as merely a conduit through which the Investors seek to obtain the insurance proceeds of her husband. That is not the case. Ms. Mueller is a party defendant in this action because she was an active and willing participant in the fraudulent scheme to deprive the Investors of substantial sums of money for the Muellers' private use. As such, the Investors are *not* mere creditors, but are seeking to recover their money which was obtained by Ms. Mueller as a direct result of her breach of her fiduciary duty to these investors to invest this money in medical and hospital equipment. Illinois law has fully recognized that such conspiracies are outside the ambit of Section 850. *Roth v. Kaptowsky*, 393 Ill. 484, 66 N.E.2d 664 (1946); *Callner v. Greenberg*, 376 Ill. 212, 33 N.E.2d 437 (1941).

In *Roth, supra.*, the Illinois Supreme Court ruled that a creditor could recover life insurance proceeds from a beneficiary when the action or judgment was against the insured and his beneficiary. The creditor had a judgment for $2,500.00 against both the insured and his wife. The insured died, leaving $6,644.41 of insurance money to his wife. Garnishment proceedings were instituted against his wife to recover the $2,500.00 judgment. The Illinois Supreme Court exempted this action from Section 850,

stating:

> "It is to be observed, however, that this section by its terms, relieves the proceeds of insurance policies, coming within the purview of the section, from the debts and liabilities of the insured. In this case the liability evidenced originally by the note and *subsequently by the judgment was against not only the (husband), the insured, but also (his wife), the beneficiary. Roth vs. Kaptowsky*, 66 N.E.2d at 668 (Emphasis added).

All of the cases cited by the Petitioners in support of Ms. Mueller's vested right to the insurance proceeds are distinguishable from this case. In *Bank of Lyons v. Schultz*, 22 Ill.App.3d 410, 318 N.E.2d 52 (1st Dist. 1974) the insured's wife was not a party to the action or the lawsuit and involved a member of the insured's creditors. The same is true of the bankruptcy in *Vieth v. Chicago Title and Trust Co., el al.*, 307 Ill.App. 99, 30 N.E.2d 126 (3rd Dist. 1940). In *Travelers Insurance Company v. Daniels*, 667 F.2d 572 (CA 7 1981) the Seventh Circuit specifically noted that the beneficiary's rights to insurance proceeds are vested unless someone other than a named beneficiary can demonstrate an equitable right to the proceeds. 667 F.2d at 573. The Investors have clearly alleged that Ms. Mueller participated in the scheme to defraud and had use of the funds acquired by the fraudulent investment scheme. It is up to the district court to determine the merits of the Investors' and Petitioners' claims to these funds.

Finally, the Petitioners' assertion that the district court's order deprived Ms. Mueller of her "entitlement" to the insurance proceeds is completely without merit. As argued above, one of the central issues in this litigation is who is entitled to the insurance proceeds currently in escrow. Illinois law clearly provides that a beneficiary's interest will only vest when no other equitable claim to the proceeds is present. *Travelers Insurance*

Company vs. Daniels, supra. In addition, any judgment against Ms. Mueller will allow the Investors to recover from the proceeds of the insurance payable to her. *Roth v. Kaptowsky, supra.* Ms. Mueller does not have a clearly vested "entitlement" to these proceeds under Illinois law.

Fuentes v. Shevin, 407 U.S.67, 32 L.Ed.2d 556, 92 S.Ct. 1983(1972) requires that the plaintiff must demonstrate a substantial property interest in the goods or properly seized or no procedural due process violation will lie. In *Fuentes, supra.*, the petitioners challenged two states' replevin statutes which allowed the seizure of goods without a prior hearing. The parties in *Fuentes* had a demonstrable and substantial interest in the property seized, they had a right to *use* the goods. In this case, Ms. Mueller's rights to the ownership and use of the insurance proceeds are at *issue*, and she has no significant property interest in this money until a final adjudication of the Investors' claims has been reached.

Wherefore, the Petitioners' request for a writ of certiorari must be denied.

CONCLUSION

For the foregoing reasons, the Respondents, ARTHUR J. TONNESEN and ELAINE D. TONNESEN, JOSEPH and MARY SHEKLETON, THOMAS WEISBRUCH, DAVID E. and KIM E. BORN, GUS B. and BILLIE L. NEILL, LYNN BLAND, and JAMES and CAROLYN HANSEN, respectfully request that certiorari in this case be denied.

Respectfully submitted,

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